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Nos. 93-109 and 93-5403

In the Supreme Court of the United States

OCTOBER TERM, 1993

GILBERT R. SERRANO, PETITIONER

v.

UNITED STATES OF AMERICA

EMMITT L. WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on the meaning of proof beyond a reasonable doubt.

2. Whether the district court properly instructed the jury on the intent required for conviction on the fraud charges against petitioners.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19)[1] is not reported, but the judgment is noted at 985 F.2d 575 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1993. A petition for rehearing was denied on April 27, 1993. Pet. App. B1-B2. The petition for a

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[1] "Pet. App." refers to the appendix to the petition in No. 93-109.

writ of certiorari in No. 93-109 was filed on July 19, 1993. The petition for a writ of certiorari in No. 93-5403 was filed on July 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Alaska, petitioners were convicted on numerous counts relating to their fraudulent financial transactions with a federal credit union.[2] Petitioner Serrano was sentenced to five years' imprisonment and was ordered to pay $422,000 in restitution to the National Credit Union Administration (NCUA). Petitioner Wilson was sentenced to ten years' imprisonment and was ordered to pay $850,000 in restitution to the NCUA. The court of appeals affirmed petitioners' convictions.[3] Pet. App. A1-A19.

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[2] Petitioners were convicted of fraudulently participating or sharing in credit union funds, in violation of 18 U.S.C. 1006; misapplying credit union funds, in violation of 18 U.S.C. 657; overvaluing land or property for the purpose of influencing a credit union, in violation of 18 U.S.C. 1014; making false entries in books or reports of a credit union, in violation of 18 U.S.C. 1006; making false statements in connection with a loan, in violation of 18 U.S.C. 1014; engaging in a fraudulent scheme to obtain funds of a credit union, in violation of 18 U.S.C. 1344; and of conspiring to commit those offenses, in violation of 18 U.S.C. 371. Petitioner Wilson was also convicted of issuing credit union obligations without authorization, in violation of 18 U.S.C. 1006.

[3] The court of appeals stated that it had "some doubt" concerning the district court's calculation of the amount of restitution petitioners were ordered to pay, and it remanded "those portions of [petitioners'] sentencings involving the resti-

1. Petitioner Wilson was the president of the Alaska Teamsters Federal Credit Union, and petitioner Serrano was his partner in a real estate development venture. The evidence at trial showed that petitioners fraudulently obtained loans from the credit union, which they invested in their real estate partnership. Gov't C.A. Br. 3-30.

2. At trial, petitioners asked the district court to instruct the jury on the meaning of proof beyond a reasonable doubt. Petitioners' proposed jury instruction defined "reasonable doubt" as "the kind of doubt that would make a reasonable person hesitate to act" and stated that "[p]roof beyond a reasonable doubt must * * * be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs." C.A. App. 101. The district court declined to give the requested instruction. Instead, it instructed the jury that

> [a] reasonable doubt is a doubt based upon reason and common sense, and may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty.
>
> If after a careful and impartial consideration with your fellow jurors of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a

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tution orders" for "clarification or resentencing." Pet. App. A18-A19.

> careful and impartial consideration with your fellow jurors of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

C.A. App. 105.

The district court also instructed the jury on the elements of each of the charged offenses. With respect to the offense of credit union fraud, the court instructed the jury as follows:

> In order for a defendant to be found guilty of credit union fraud in violation of § 1344 of Title 18 of the United States Code, the government must prove the following beyond a reasonable doubt:
>
> > *First*, that the defendant knowingly executed or attempted to execute a scheme or artifice to defraud the Alaska Teamsters Federal Credit Union [of money or property] as alleged in the Indictment, or that the defendant knowingly executed or attempted to execute a scheme or artifice to obtain money or property under the custody or control of the Alaska Teamsters Federal Credit Union by means of material false statements or representations;
> >
> > *Second*, the defendant did so with intent to defraud; and
> >
> > *Third*, that the Alaska Teamsters Federal Credit Union was a federally chartered or insured financial institution.
>
> * * * * *

> For the purposes of this statute the terms "scheme" and "artifice" are defined to include any plan, pattern or course of action, including false and fraudulent pretenses and misrepresentations, intended to deceive others in order to obtain something of value such as money from the institution to be deceived.
>
> A statement or representation is "false" or "fraudulent" if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or cause[d] to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" when it constitutes a half truth, or effectively conceals a material fact, with[] intent to defraud. * * *
>
> To act with "intent to defraud" means to act knowingly with a specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to oneself.

C.A. App. 153-154.

In a separate instruction, the district court informed the jury that "[t]he good faith of a defendant is a complete defense to the charges contained in the Indictment because good faith on the part of a defendant is, simply, inconsistent with intent to defraud" and that "[a]n honest mistake in judgment or an error in management does not rise to the level of intent to defraud." C.A. App. 129.

3. On appeal, petitioners argued, relying on *Holland* v. *United States*, 348 U.S. 121, 140 (1954), that

the district court's jury instruction on the meaning of proof beyond a reasonable doubt was improper because it failed to include the "hesitate to act" language approved in *Holland*. The court of appeals rejected that claim, observing that the reasonable doubt instruction the district court gave was "the standard Ninth Circuit Model Jury Instruction." Pet. App. A13-A14.

Petitioners also challenged the district court's instructions on the state of mind necessary to establish fraud. On that issue, the court of appeals found "no error" in the district court's instruction that false or fraudulent statements included statements made with reckless indifference as to their truth or falsity. Pet. App. A14.

ARGUMENT

1. Petitioners contend (93-109 Pet. 10-18; 93-5403 Pet. 4-11) that the jury instruction on the meaning of proof beyond a reasonable doubt violated due process because it informed the jurors that they must be "firmly convinced" of petitioners' guilt in order to convict them and did not include the "hesitate to act" language that petitioners had requested. The court of appeals correctly rejected that claim.

Contrary to petitioners' argument, neither this Court nor any court of appeals has held that the Due Process Clause requires inclusion of the "hesitate to act" language in a reasonable doubt instruction. In *Holland* v. *United States*, *supra*, on which petitioners rely, the challenged jury instruction defined "reasonable doubt" as "the kind of doubt * * * which you folks in the more serious and important affairs of your own lives might be willing to act upon." 348 U.S. at 140. The Court stated that "this section of the charge

should have been in terms of the kind of doubt that would make a person hesitate to act, * * * rather than the kind on which he would be willing to act," but nevertheless affirmed the defendants' convictions, concluding that "the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some." *Ibid.* Thus, *Holland* plainly does not hold that omission of the "hesitate to act" language in a reasonable doubt instruction is error. Similarly, although some courts of appeals have expressed a preference for the "hesitate to act" formulation, no court has held that failure to use that language violates the Due Process Clause. See, *e.g.*, *United States* v. *Barrera-Gonzales*, 952 F.2d 1269, 1272 (10th Cir. 1992) (noting that court has "upheld several 'reasonable doubt' instructions which have strayed from the 'hesitate to act' formula").

Petitioners also rely (93-109 Pet. 11; 93-5403 Pet. 5, 6-7) on *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), but that decision does not support their claim. In *Cage*, this Court sustained a due process challenge to a jury instruction stating that "reasonable doubt" means "such doubt as would give rise to a grave uncertainty" and "an actual substantial doubt" precluding "a moral certainty" of guilt. *Id.* at 40 (internal quotation marks and emphases omitted). The Court found it "plain" that "the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Id.* at 41. Such a suggestion was reinforced, the Court explained, by "the reference to

'moral certainty,' rather than evidentiary certainty."[4] *Ibid.*

The reasonable doubt instruction given at petitioners' trial did not contain any of the wording condemned in *Cage*. Courts have recognized that, unlike the jury instruction at issue in *Cage*, an instruction such as the one given at petitioners' trial, which informs the jurors that they must be "firmly convinced" of the defendant's guilt in order to convict him, does not lower the government's burden of proof. See *United States* v. *Taylor*, No. 92-3112 (D.C. Cir. July 20, 1993), slip op. 11 (jury instruction using "firmly convinced" language does not "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard"); see also *United States* v. *Barrera-Gonzales*, 952 F.2d at 1273; *United States* v. *Hunt*, 794 F.2d 1095, 1100-1101 (5th Cir. 1986); *United States* v. *Gibson*, 726 F.2d 869, 874 (1st Cir.), cert. denied, 466 U.S. 960 (1984). Cf. Federal Judicial Center, *Pattern Criminal Jury Instructions* 28 (1982) (Instruction 21) (defining "[p]roof beyond a reasonable doubt" as "proof that leaves you firmly convinced of the defendant's guilt"). Thus, there was no reasonable likelihood that the jury that convicted petitioners applied the reasonable doubt instruction in a manner that violated due process. See *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 (1991).

Petitioners' claim (93-109 Pet. 12-15; 93-5403 Pet. 5, 9-10) that the decision below conflicts with decisions

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[4] In *Sullivan* v. *Louisiana*, 113 S. Ct. 2078 (1993), which involved a reasonable doubt instruction that was "essentially identical to the one held unconstitutional" in *Cage*, the Court held that a constitutionally deficient reasonable doubt instruction could not be harmless error. 113 S. Ct. at 2080, 2082-2083.

of other circuits is incorrect. Although petitioners cite cases that have rejected other formulations of the reasonable doubt standard, they do not point to any decision holding that use of the "firmly convinced" language in a reasonable doubt instruction violates due process. See *United States* v. *Taylor*, *supra*, slip op. 11 (noting that no circuit has found a reasonable doubt instruction modeled on the Federal Judicial Center's pattern instruction to be reversible error). Accordingly, this case presents no conflict among the circuits that warrants review by this Court.

2. Petitioner Serrano also challenges (93-109 Pet. 19-26) the jury instruction defining the elements of credit union fraud.[5] He claims that by equating knowledge that a statement is false with "reckless indifference as to its truth or falsity," the district court permitted the jury to convict him based merely on evidence of recklessness, without requiring proof of fraudulent intent.

Petitioner's contention is incorrect. The district court's instructions clearly advised the jury that "false" or "fraudulent" statements, in addition to being knowingly false or made with reckless disregard as to their truth or falsity, must also be "made or cause[d] to be made with intent to defraud." Thus, the court informed the jurors that in order to convict petitioners, they must find that petitioners acted "with a specific intent to deceive someone." Those instructions eliminated any risk that the jurors

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[5] Petitioner Wilson does not argue this point separately, but adopts the arguments made by petitioner Serrano. See 93-5403 Pet. 11.

would believe they could find petitioners guilty without proof of intent to defraud.[6]

Petitioner misplaces reliance (93-109 Pet. 23-25) on *United States* v. *Adamson*, 700 F.2d 953 (5th Cir.) (en banc), cert. denied, 464 U.S. 833 (1983), and *United States* v. *McAnally*, 666 F.2d 1116 (7th Cir. 1981). In each of those cases, the district court instructed the jury that proof of the defendant's "reckless disregard" of the interest of the defrauded bank was sufficient to establish the requisite intent to defraud. See 700 F.2d at 965-966; 666 F.2d at 1118. In this case, in contrast, the district court instructed the jury that it could find that statements were "false" or "fraudulent" if they were made with reckless disregard of their truth or falsity *and* were made with intent to defraud. C.A. App. 154.[7]

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[6] Petitioner Serrano's argument (93-109 Pet. 25) that the jury could have convicted him merely for innocently trusting petitioner Wilson to obtain loans from the credit union is unavailing in light of the district court's instruction to the jury that "good faith on the part of a defendant is * * * inconsistent with intent to defraud" and that "[a]n honest mistake in judgment or an error in management does not rise to the level of intent to defraud." C.A. App. 129.

[7] The decisions of this Court on which petitioner relies (93-109 Pet. 22-23) are even less helpful to him. Each of those cases involved a prosecution under a statute not at issue here, and none of them involved a jury instruction remotely like the one given in this case. In *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), in which the defendants were charged with engaging in a price-fixing conspiracy in violation of the federal antitrust laws, the Court held that "a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom." *Id.* at 435. Accordingly, the Court concluded that the district court erred in instructing the jury that if the effect

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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of the defendants' exchange of pricing information was to raise or maintain prices, the defendants were "presumed, as a matter of law, to have intended that result." *Id.* at 430, 446. In *Liparota* v. *United States*, 471 U.S. 419 (1985), the Court held that the federal food stamp fraud statute, 7 U.S.C. 2024(b)(1), which makes it unlawful to "knowingly" acquire or possess food stamps "in any manner not authorized by [the statute] or the regulations," requires the government to prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by the statute or regulations, and that the district court erred in failing to instruct the jury regarding that requirement. 471 U.S. at 433. Finally, in *Cheek* v. *United States*, 498 U.S. 192 (1991), the Court held that in a criminal tax prosecution the district court erred in instructing the jury that a defendant's good faith misunderstanding of the law negates the statutory willfulness requirement only if the misunderstanding is objectively reasonable. *Id.* at 201. In this case, the district court's good faith instruction informed the jury without limitation that "[t]he good faith of a defendant is a complete defense to the charges contained in the Indictment." C.A. App. 129.